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Dennis W. Talbot v. Aerotrans Corporation, a Utah Corporation, Kelly M. Barnett and Jack Dykstra : Brief of Appellee

Utah Court of Appeals

Craig G. Adamson; Eric P. Lee; Craig A. Hoggan; Dart Adamson Donovan and Hanson.
Milo Steven Marsden; Karen L. Martinez; Giaque, Crockett, Bendinger and Peterson.

IN THE UTAH COURT OF APPEALS

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DENNIS W. TALBOT, Plaintiff/Appellant v. AEROTRANS CORPORATION, a Utah corporation, KELLY M. BARNETT and JACK DYKSTRA, Defendants/Appellees,	:	Case No. 981754-CA Priority No. 15

981754-CA

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BRIEF OF APPELLEE, JACK DYKSTRA

On appeal from the grant of summary judgment by the Third District Court for Salt Lake County, Honorable Homer F. Wilkinson, District Judge

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

1. Did the District Court correctly grant summary judgment in Dykstra's favor on Talbot's cause of action for mandatory injunction (requiring Dykstra to transfer the Windjet assets to Talbot) after Talbot failed to comply with Court ordered prerequisites to the issuance of an injunction, abandoned his only substantive claim against Dykstra, and failed to dispute facts which showed that granting the requested relief would be inequitable?

Standard of Review: This Court accords no deference to the District Court's grant of summary judgment and reviews it for correctness. Glover ex rel Dyson v. Boy Scouts of Am., 923 P.2d 1383, 1385 (Utah 1996). This Court reviews a District Court's decision to grant or deny an injunction for an abuse of discretion. Aquagen Int'l, Inc. v. Calrae Trust, 972 P.2d 411, 412 (Utah 1998) (citing Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992)).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no determinative constitutional or statutory provisions.

STATEMENT OF THE CASE

Nature Of The Case

This case arises from appellant Dennis Talbot's ("Talbot") flawed -- and failed -- attempt to exercise a "right of first refusal," that he obtained in 1995, when he transferred all of his right, title and interest in a trademark and a patent for a multi-use

watercraft (the "Windjet assets") to a company called AeroTrans Corporation. Initially in September 1994, Talbot sold his interest in the Windjet assets to Hydrodynamics, Inc. In exchange, Talbot received a 5% royalty on certain revenues if Hydrodynamics succeeded in manufacturing and selling Windjet. Hydrodynamics build approximately 12 boats of unsatisfactory quality and ran out of money. On August 17, 1995 Hydrodynamics merged with AeroTrans pursuant to an Agreement and Plan of Reorganization. As part of the merger, AeroTrans agreed to pay Talbot a reduced royalty and grated Talbot a five year "right of first refusal" to buy the Windjet intellectual property "at a price and upon the terms" offered to AeroTrans by a third party.

Like Hydrodynamics, AeroTrans unsuccessfully attempted to develop the Windjet assets. By September of 1996, AeroTrans was in serious financial difficulty and had defaulted on loans it had from Zions Bank, which were secured by the Windjet assets, and other assets of AeroTrans. AeroTrans and Zions entered a Forbearance Agreement, and a revised Forbearance Agreement which required AeroTrans to pay off its entire liability to Zions by December 13. In order to avoid foreclosure, AeroTrans began looking at liquidating assets (including the Windjet assets) in order to pay off its liability to Zions.

On approximately October 28, 1996, Jack Dykstra ("Dykstra") submitted an offer to AeroTrans to purchase the Windjet assets for $720,000 in cash. (R. 1353-54.) In order to meet AeroTrans' concerns regarding paying off its liability to Zions Bank, Dykstra's offer provided that the entire purchase price would be unconditionally placed

in escrow by November 30, 1996, and that the transaction would close no later than December 12, 1996. (R. 1354.)

Pursuant to the right of first refusal, Dykstra's offer was conveyed to Talbot. Despite some indication that he intended to match the Dykstra offer, on November 30 Talbot failed to deposit any funds in escrow. (R. 1336.) Accordingly, AeroTrans began preparation to close a transaction with Dykstra.

Course Of Proceeding Below

On December 5th, Talbot filed suit against AeroTrans -- but not against Dykstra. (R. 1-25.) Among other things, the suit sought a temporary restraining order preventing AeroTrans from selling the Windjet assets to Dykstra. (R. 26-29.) On December 6th, the Third District Court (Judge Homer Wilkinson) heard from counsel. Talbot's counsel attempted to excuse his client's failure to meet the November 30th deadline by representing that Talbot now had the $720,000 necessary to match the Dykstra offer, and that Talbot was "ready, willing and able" to deliver the $720,000. Based in part on these representations, the Court entered a restraining order preventing AeroTrans from consummating its proposed transaction with Dykstra prior to 12:00 noon the following Monday, December 9, 1996. (R. 35-37.) The purpose of the Court's order was to provide Talbot with one last chance to come up with the $720,000. But at the hearing, and in his temporary restraining order, the Court made clear that he would not prevent the transaction between AeroTrans and Dykstra from going forward if Talbot failed to come up with the money -- with no strings attached. (Id.) The Court's order required Talbot to "deposit $720,000 in immediately available

funds" into the trust account of Holme, Roberts & Owen by noon on December 9, 1996. (Id.) The Order further stated that "failure to make such deposit by 12:00 noon, December 9, 1996 [would] result in dismissal" of the Court's order. (Id.) Talbot failed to deposit the required funds on time. And, when he did tender money, it was not immediately available funds. Moreover, it was clear that Talbot was not relinquishing control over the money, but was only conditionally depositing it, pending further due diligence by Talbot.

Accordingly, the Court dissolved its temporary restraining order. (R. 44-45.) AeroTrans and Dykstra closed their transaction on December 11, and Dykstra became the owner of the Windjet assets. (R. 1356.)

Thereafter, Talbot amended his Complaint to add Dykstra and AeroTrans officer, Kelly M. Barnett as defendants. (R. 355-79.) Talbot asserted an intentional interference claim against Dykstra, and a count seeking a mandatory injunction requiring Dykstra to convey the Windjet assets to Talbot. (Id.) After the close of discovery, Dykstra moved for summary judgment on all claims. (R. 1330-84.) The trial court granted Dykstra's motion, and this appeal followed.

Statement Of The Facts

Concurrently with his appeal of the trial court's order regarding Dykstra's motion for summary judgment, Talbot appealed the court's order regarding a similar motion filed by Kelly M. Barnett -- formerly an officer of AeroTrans. The facts surrounding the background of the transaction that is the subject of this lawsuit, and Talbot's failed attempt to exercise his right of first refusal are fully set forth in the Brief of Appellee,

Kelly M. Barnett. See Brief of Appellee Kelly M. Barnett at 6-22. Dykstra hereby adopts and incorporates by reference the Statement of Facts set forth in Barnett's brief. Accordingly, set forth below are only those additional facts that are material to arguments made in this brief.

On August 1, 1997, Dykstra filed his motion for summary judgment in this case. In it Dykstra asked the Court to grant judgment in his favor on the two causes of action Talbot had pled against him -- Count III - for tortious interference and Count IV - for a mandatory injunction requiring Dykstra to convey the Windjet assets to Talbot.

In support of this motion, Dykstra set forth the following undisputed material facts:

> 1. On December 2, 1996, Mr. Dykstra was informed that Mr. Talbot had failed to deposit $720,000 in immediately available funds, into the Holme, Robert & Owen Trust Account, as he was required to do by November 30, 1996 in order to match the purchase offer Mr. Dykstra had made to AeroTrans.
>
> 2. Notwithstanding this failure, on or about December 3, 1996, Talbot indicated he intended to file suit seeking to block AeroTrans's sale of the Windjet assets to Mr. Dykstra, and on December 5, 1996, Talbot filed his Complaint and sought an immediate hearing to prevent AeroTrans from consummating its sale transaction with Mr. Dykstra.
>
> 3. In light of these developments, the scheduled closing between AeroTrans and Mr. Dykstra was canceled in order that the matter might be reviewed by the Court. On December 6, 1996, a hearing was held and this Court entered a Temporary Restraining Order preventing AeroTrans from closing its sale to Mr. Dykstra. See Order, dated December 6, 1996 at 4:00 p.m.
>
> 4. As a condition of the December 6 Order, the Court required Talbot to "deposit $720,000 in immediately available funds" into the trust account of Holme, Roberts & Owen by noon on December 9, 1996. The

Order further stated that "failure to make such deposit by 12:00 noon, December 9, 1996 [would] result in dismissal" of the Court's order.

5. Mr. Talbot failed to comply with the Court's December 6 Order. As a result, on December 9, 1996, the Court denied Mr. Talbot's Motion for a Temporary Restraining Order and for a Preliminary Injunction.[1] After entry of the Court's December 9 Order, there was no apparent legal impediment to AeroTrans completing the sale of the Windjet assets to Dykstra.

6. Accordingly, on December 11, 1996, Dykstra and AeroTrans entered a definitive Asset Purchase and Sale Agreement pursuant to which Dykstra paid $720,000 for the Windjet Assets and AeroTrans transferred all its right, title and interest in the Windjet Assets to Mr. Dykstra. Shortly thereafter, Mr. Dykstra formed Windjet Manufacturing, LLC to conduct a manufacturing and sales business of the Windjet. Mr. Dykstra and his wife are the sole members of Windjet Manufacturing, LLC.

7. In the nearly eight months since he purchased the Windjet assets, Mr. Dykstra has spent full time diligently operating the business to maximize its potential. In addition, he has infused a substantial portion of his net worth into the business. From January 1, 1997 to date he has infused approximately $1.2 million (in addition to the original $720,000) to operate and develop Windjet Manufacturing. Under Windjet Manufacturing's current schedules and plan he will infuse another approximately $500,000 into the business between August 1, 1997 and September 30, 1997.

8. Windjet Manufacturing also has developed a substantial work force over the last eight months. Its current work force is over 30 full-time employees. The Company's current payroll is over $1 million annually. All of these employees are dependent on Windjet Manufacturing for employment. Without the Windjet Assets, Windjet Manufacturing would be required to cease operations and these jobs will be lost.

9. Windjet Manufacturing also has expended significant sums to develop its production capacity. Windjet Manufacturing has reached a

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[1] The Court's oral order was memorialized in a written order dated December 11, 1996.

binding agreement with its landlord to purchase the building it currently occupies. It will cost over $2.4 million to complete this transaction.

10. Windjet Manufacturing submitted an offer to the AeroTrans bankruptcy Trustee to purchase, in bulk, AeroTrans's remaining manufacturing equipment. Notice was provided to all interested parties and after the time for objections passed the sale was approved by the bankruptcy court.

11. Windjet Manufacturing also has expended substantial sums to address deficiencies in the design of the Windjet as acquired from AeroTrans. As of January 1, 1997, the AeroTrans Windjet would accommodate only one type of personal watercraft. This limitation presented a serious obstacle to wide spread marketing of the Windjet. To address it, Windjet Manufacturing has among other things, modified the design of the watercraft's receiving bay so that it can easily couple with and accommodate most personal watercraft. Windjet Manufacturing has also modified the deck layout, and added storage space to the design of the watercraft. As a result of these modifications, the Windjet has become a much more marketable (and therefor) much more valuable watercraft than the one acquired from AeroTrans. Windjet Manufacturing has also expended substantial sums in applying for patents on its new designs, and in building new (or modifying old) production tools to manufacture the improved watercraft. The total of these expenditures to date is in excess of $150,000.

12. Windjet Manufacturing also has expended over $100,000 in efforts to develop a market and dealer network for the Windjet. Such a network is critical to any effort for widespread sales of Windjet. Windjet Manufacturing commissioned redesign of all its marketing brochures and videos at substantial cost. In addition, Windjet Manufacturing has paid substantial non-refundable fees to secure space in various trade shows around the United States. Windjet Manufacturing has also expended substantial money (and continues to expend money) to secure the services of a public relations firm to promote the Windjet.

13. Finally, Windjet Manufacturing has entered numerous contractual relationships with suppliers. To date, Windjet Marketing has concluded arrangements with approximately 60 vendors in connection with its manufacturing operations. Lead times for these vendors can be as much as eight weeks. As a result of these relationships, Windjet

> Manufacturing maintains approximately $100,000 in open purchase orders at any time.

(R. 1336-40.)

On October 17, 1997, Talbot filed his Memorandum in Opposition to Dykstra's Motion for Summary Judgment. In it, Talbot expressly "conceded that the evidence is not likely sufficient to prevail on the interference claim," and on that basis Talbot said he was withdrawing the claim. (R. 1531-32.)

With respect to Dykstra's statement of facts, Talbot said that he did "not agree with all of the factual assertions," (R. 1532), but Talbot did not dispute any of Dykstra's factual statements by "specifi[c] refer[ence] to those portions of the record upon which [he] relie[d]," as required by Rule 4-501(2)(b) of the Utah Rules of Judicial Administration.

Since he purchased the Windjet, Dykstra has worked diligently operating the business to maximize its potential. In addition, he has infused a substantial portion of his net worth into the business. From January 1, 1997 to the present time, Dykstra's outlays in operating and developing Windjet Manufacturing total approximately $3.2 million. Since the time of the summary judgment hearing, Dykstra has relocated Windjet Manufacturing to Southern Florida in order to reduce transportation costs and maximize marketing advantages.

SUMMARY OF THE ARGUMENT

These are two principal reasons why the trial court was correct in granting Dykstra's motion for summary judgment. First, the trail court correctly ruled that there

was no breach of Talbot's right of first refusal by AeroTrans. Contrary to Talbot's assertions, Utah law is clear that an option contract (such as a right of first refusal) must be strictly accepted according to the offer terms, and Talbot admits he failed to do that here. Moreover, it is clear that Talbot's failures to meet the offer terms were material -- especially given AeroTrans' financial condition. The points supporting this argument are fully set forth in the Brief of Appellee, Kelly M. Barnett. Rather than repeat them here, Dykstra incorporates by reference the Argument section of Barnett's brief.

Second, even if there had been a breach of the right of first refusal, the District Court's order granting summary judgment on Talbot's request for a mandatory injunction against Dykstra was proper. Talbot asserts that the District Court erred by failing to enter a mandatory injunction requiring the Dykstras to transfer ownership of the Windjet assets to Talbot upon tender of the purchase price. Talbot relies on the Restatement (Second) of Contracts to conclude that his failure to timely deposit the purchase price was not a material breach of his contract to purchase the Windjet Assets. Talbot's reliance on the Restatement is misplaced. Not only did Talbot fail to timely deposit the AeroTrans purchase price into the HRO Trust Account as required by the Dykstras' offer but he failed to comply with the prerequisites the District Court set for receiving equitable relief -- namely depositing $720,000 in immediately available funds into the HRO Trust Account prior to 12:00 noon on December 9, 1996. Talbot's failure to comply with the District Court order cannot be cured and is not subject to the rules of contract interpretation. Talbot admittedly did not comply with

the Court order, he cannot now complain that his failure to comply was subject to reform. Based on Talbot's failure to comply with the Court's order, the District Court acted within its discretion by refusing to grant Talbot's request for an equitable relief.

Moreover, once the transaction was allowed to go forward, unwinding it became inequitable and effectively impossible. Dykstra in good faith, relied on the District Court ruling which permitted the transaction to proceed. Since that time, Dykstra has invested significant time, effort and resources in the development of the Windjet product and the product itself has changed tremendously. If this Court required Dykstra to convey the Windjet Assets to Talbot serious injustice would result. Talbot would receive the benefit of Dykstra's efforts over the last two years and Dykstra would be left holding the bag.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED TALBOT'S REQUEST FOR A MANDATORY INJUNCTION BECAUSE TALBOT FAILED TO COMPLY WITH COURT ORDERED PRECONDITIONS TO THE INJUNCTION'S ISSUANCE

This Court should affirm summary judgment in Dykstra's favor on Talbot's claim for a mandatory injunction because Talbot's failure to comply with the District Court order is dispositive. That order required that Talbot deposit the $720,000 purchase price of the Windjet Assets in the HRO Trust Account by 12:00 noon, December 9. It is undisputed that Talbot failed to comply with that order, even after representing to the District Court that he was ready, willing and able to make the required deposit. Furthermore, even if the District Court erred in not granting Talbot's injunction, now

setting aside the conveyance of the Windjet assets to the Dykstras would be inequitable in light of the undisputed facts.

In the prayer of his Amended Complaint, Talbot asked the District Court for "a mandatory injunction requiring the Dykstras to transfer ownership of all such assets to Talbot upon payment of the purchase price." (R. 364.) On December 5, 1996 — prior to AeroTrans's sale of the Windjet assets to Dykstra — Talbot came before the District Court seeking a temporary restraining order to prevent AeroTrans from selling the Windjet assets to Dykstra. (R. 35-37.) At that time, Talbot and his counsel represented to the District Court that they were "ready, willing, and able to escrow the purchase price." (R. 1046 at Ex. 8) Based upon this and other representations by Talbot, the Court entered a Temporary Restraining Order prohibiting AeroTrans from selling the Windjet assets. (R. 1046 at Ex. 8.) The Court's order was expressly conditioned on Talbot "deposit[ing] $720,000 in immediately available funds into the following account: Holme, Roberts & Owen Trust Account, Zions Bank Acct. No. 0314833, ABA Routing No. 124-000054 Third South and Main Branch." (R. 26-29.) Funds Talbot alleged were readily available. The order expressly warned that "failure to make such deposit by 12:00 noon, December 9, 1996, shall result in dismissal of this order." (Id.) Notwithstanding this express warning, Talbot failed to comply with the Court's order. On December 9 — after Talbot failed to comply with the directives of the District Court's December 6th Order — the District Court entered a further order "determin[ing] that Plaintiff has not complied with the Court's December 6, 1996

Order," and on that basis ordered that "Plaintiff's Motion for Temporary Restraining Order and for Preliminary Injunction is denied." (R. 43.)

In LHIW, Inc. v. DeLorean, 753 P.2d 961 (Utah 1988) the Utah Supreme Court determined that denial of a request for specific performance (another form of equitable relief) in circumstances just like those presented here was entirely proper. There the parties had entered a contract for the sale of a business. Between execution of the original agreement and the scheduled closing of the transaction, the seller determined (for reasons not relevant here), not to go forward and close the transaction. The purchaser then filed suit seeking a temporary restraining order and preliminary injunction granting specific performance of the sale contract. Id. at 962. Like the District Court in this case, the LHIW court granted the motion "on the condition that LHIW [the purchaser] make payment into court at a court-ordered closing . . . of $5,250,000 less $100,000 earnest money previously paid." Id. The purchaser failed to make the payment into court as required under the temporary restraining order. When it did so, the District court denied the request for specific performance.

On appeal, the Utah Supreme Court reviewed this action and found that the District Court had acted properly. The Court first explained that "[s]pecific performance is an equitable remedy," and that "a party seeking equity must do so with clean hands." Id. at 963. As such, the Court stated "[s]pecific performance will not be granted to a plaintiff who is unable or unwilling to perform," and "[w]here tender into court is required as a prerequisite of specific performance, that tender, as with all tender, must be made without condition and must evidence a willingness and

readiness to perform." Id. (emphasis added) (citing Brooks v. Scoville, 17 P.2d 218, 222 (Utah 1932); Zion's Properties v. Holt, 538 P.2d 1319, 1322 (Utah 1975)). The Supreme Court then found that the purchaser's "failure or inability to perform" in accordance with the trial court's order — like Talbot's failure to do so here — was alone "sufficient justification to deny an equitable remedy." Id. at 963.

In his brief Talbot relies heavily on the Restatement (Second) of Contracts and argues that disputed material facts exist regarding the materiality of his breach of contract to purchase the Windjet assets. (See Appellant's Brief at 10-19.) His reliance is misplaced. Regardless of the nature of Talbot's breach of the Windjet purchase contract, it is undisputed that Talbot failed to comply with a Court order. (R. 43.) LHIW teaches that such a failure alone is sufficient to deny specific performance. Quite simply, the District Court order is not subject to contract interpretation. In re Carr, 2 Cal. Bar Ct. Rptr. 244, 252 (Cal. Bar Ct. 1992) ("The rules of contract interpretation do not apply to court orders.") Thus, this Court need not wade into the mire of materiality of Talbot's breach. His blatant disregard for the District Court order itself precludes the relief he seeks.

Furthermore as an equitable remedy, "specific performance should not be ordered where it appears that doing so may result in undue hardship or injustice to either party." Furniture Unlimited Inc. v. Lineage Home Furnishings, Inc., 1995 U.S. Dist. Lexis 2745 (E.D. Pa. March 2, 1995), at 11; see also Double AA Corp. v. Newland & Co., 905 P.2d 138, 140-41 (Mont. 1995); Restatement (Second) of Contracts § 364 (1979). Here Talbot did not dispute any of the facts set forth in

Dykstra's motion for summary judgment. Accordingly, the trial court correctly deemed them admitted under Rule 4-501(2)(b) of the Utah Rules of Judicial Administration. The trial court was well within its discretion in determining that the undisputed facts showed that any order of specific performance at this stage would clearly be unjust, and would clearly pose an undue hardship on Dykstra.

First, it was only after the District Court's December 9 Order that AeroTrans and Dykstra proceeded to execute a definitive Asset Purchase and Sale Agreement closing the sale transaction. (R. 1355-56.) Thus, at the time Dykstra bought the Windjet assets the District Court had reviewed Talbot's claims of wrongdoing and had denied his request to stop the sale, based on his own conduct. As set forth in his Declaration, in reliance on this Court's December 9 Order allowing the sale, Dykstra closed the sale, and purchased the Windjet assets. (Id.)

Second, since acquiring the Windjet assets, Dykstra has undertaken a series of actions as a prudent businessman to develop the Windjet business. In addition to funding two years of operations, Dykstra has expended hundreds of thousands of dollars in these activities. As Dykstra testified in his Declaration: From January 1, 1997 to the filing of Dykstra's motion for summary judgment, he had infused approximately $1.2 (in addition to the original $720,000) to operate and develop Windjet Manufacturing. (R. 1356.) That amount has increased to total investment to date of approximately $3.2 million. Dykstra and Windjet Manufacturing purchased from the Trustee liquidating AeroTrans in bankruptcy one hundred thousand dollars of equipment. (Id.) Dykstra and Windjet Manufacturing have substantially redesigned

the Windjet watercraft to address deficiencies in the original design. Windjet Manufacturing has applied for patents on these new designs, and has expended tens of thousands of dollars to modify production tools that were acquired as part of the Windjet assets, to accommodate the new and improved designs. (Id.)

In addition to the significant financial investment, Dykstra relocated Windjet Manufacturing to Southern Florida and continues to this day to work toward making Windjet a successful product. The above actions effectively make "unwinding" the transaction, as Talbot requests, not only an undue hardship, but effectively impossible

Third, at the time Dykstra's motion for summary judgment was presented Talbot had abandoned his only substantive claim against Dykstra -- tortious interference. Accordingly, at that time it was undisputed that Dykstra had not engaged in any wrongful conduct in his dealings with AeroTrans or with Talbot.

Were this Court to order Dykstra to reconvey the Windjet assets to Talbot, Talbot would receive a huge windfall, and Dykstra would be left "holding the bag" on all these expenditures, made prudently and in good faith, after the District Court allowed him to purchase the Windjet assets from AeroTrans. What Talbot in essence is asking is that this Court, after the District Court allowed the sale to proceed, now rescind it without the ability to put Dykstra back in the position he was prior to the sale. Such a result would hardly be equitable, and it is not appropriate under Utah law. 50 West Broadway v. Redevelopment Agency, 784 P.2d 1162, 1170-71 (Utah 1989) (a party seeking rescission "must be able to place the other party in the same position that existed before the execution of the contract"). Therefore, this Court should affirm

summary judgment in Dykstra's favor on Talbot's Fourth Cause of Action (seeking specific performance), and remove this cloud from Dykstra's operation of Windjet Manufacturing.

Talbot's sole basis for claiming that a mandatory injunction may issue against him is that, according to Talbot, "[w]hatever investment Dykstra made in the Windjet Assets was made with full knowledge of this lawsuit and the risks it poses." (Appellant's Brief at 24.) This argument is wrong on both the facts and the law.

First, Dykstra did not consummate his purchase of the Windjet Assets until December 11, 1996. By that time, Talbot had failed to deposit the $720,000 purchase price in the trust account of Holme, Roberts & Owen, as required by the terms of Dykstra's offer. After Talbot's failure to meet Dykstra's offer, AeroTrans indicated its intent to immediately go forward with the sale to Dykstra. Talbot then filed a Complaint against AeroTrans seeking to prevent AeroTrans from selling the Windjet Assets to Dykstra. With his Complaint, Talbot filed a Motion for a Temporary Restraining Order for a preliminary injunction seeking to prevent the sale. After a hearing, this Court granted Talbot "one last chance" (until 12:00 noon on December 9) to deposit the $720,000 in immediately available funds with Holme, Roberts & Owen, and Talbot failed to do so. After Talbot's failure to properly tender the purchase price on December 9th, the Court dissolved its temporary restraining order against AeroTrans, effectively allowing AeroTrans to complete the sale to Dykstra.[2]

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[2] As Dykstra has previously pointed out, under the case of LHIW v. DeLorean, 753 P.2d 961 (Utah 1988), the District Court's actions were entirely proper

Contrary to Talbot's insinuation, Dykstra was not added as a defendant to this lawsuit, and no claims were made against him until after he had purchased the Windjet assets. Then, Talbot filed an Amended Complaint which, for the first time named Dykstra, and asserted that Dykstra had interfered with Talbot's exercise of his right of first refusal. Thus, at the time Dykstra purchased the Windjet assets he was aware there was a lawsuit against AeroTrans, that Talbot had asked this Court to prevent the sale of the Windjet assets, and that this Court had refused to do so.

Second, Talbot's claim that a mandatory injunction requiring Dykstra to reconvey the "Windjet Assets" may be granted solely on the basis that Dykstra "was aware" of Talbot's lawsuit against AeroTrans is completely unsupported, and just plain wrong. As the U.S. Supreme Court has stated, "the standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 546 n. 12 (1987); see also Utah Medical Prods, Inc. v. Searcy, 958 P.2d 228, 231 (Utah 1998). Furthermore, an injunction is a drastic, extraordinary remedy and an applicant's "right to relief must be clear and unequivocal." SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) (citing GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984) and Penn v. San Juan Hosp., 528 F.2d 1181, 1185

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under those circumstances. See infra at 9. Where a court requires tender "as a prerequisite of specific performance, that tender, as with all tender, must be made without condition and must evidence a willingness and readiness to perform." LHIW, 753 P.2d at 963. Talbot's Brief does not even address this argument.

(10th Cir. 1975))[3]; see generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 428-29 & nn. 19-21 (1973 & Supp. 1991). Thus, to obtain the special equitable remedy of a permanent mandatory injunction, Talbot must not show a likelihood of prevailing on the merits of his substantive claims, but in addition must "clearly and unequivocally" show that he will be irreparably harmed absent the injunction, that his injury outweighs the injury the injunction will cause others, and that the injunction is in the public interest. See Otero Savings and Loan Ass'n, 665 F.2d at 278; SCFC ILC, Inc., 936 F.2d at 1098; Utah R. Civ. P. 65A (advisory committee notes).

The District Court correctly granted summary judgment on Talbot's request for an injunction precisely because the undisputed facts show that it would work an undue hardship on Dykstra. In the now more than two years since acquiring the Windjet assets Dykstra has acted in the only way he prudently could -- he has undertaken a series of actions to develop the business. As a result, Dykstra has spent over $3.2 million in improving the Windjet itself, in modifying the assets he purchased to make

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[3] The advisory committee notes for Utah Rule of Civil Procedure 65A(e), grounds for issuing a preliminary injunction, state that the standard set forth in subsection (e) is derived from Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) and Otero Savings & Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981). Thus, this Brief relies on Tenth Circuit interpretations of the standard for the issuance of preliminary injunctions.

them more useful and more valuable. These actions make "unwinding" the transaction effectively impossible.[4]

In his Brief, Talbot does not dispute that a mandatory injunction may not be granted if it will work an undue hardship, nor does he dispute any of the facts Dykstra has pointed to showing that an injunction in this case would do just that. Instead, Talbot attempts to sidestep the issue by claiming that "the issues presented by Dykstra require the resolution of disputed issues of fact." (Appellant's Brief at 24-26.) While this claim might have merit in other circumstances, here it is a red herring because Talbot does not dispute a single fact upon which Dykstra's relied in his motion for summary judgment. Thus, it is undisputed that the equitable relief Talbot seeks would result in undue hardship.

Moreover, Talbot's Brief concedes that there is not a sufficient evidentiary basis for a tortious interference claim against Dykstra. (Appellant's Brief at 24.) He thus effectively abandoned the only substantive claim he had against Dykstra. Below Talbot failed to introduce any evidence from which the District Court could have concluded that Mr. Dykstra tortiously interfered with Talbot's right of first refusal and a thorough review of the record reveals none. In fact quite the opposite holds, Mr. Dykstra waited patiently for Talbot to decide whether he would exercise his right, even offering to compensate Talbot if he would forego his right of first refusal. (R. 1382-83.)

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[4] In his Brief, Talbot blithely asserts this problem may be solved by granting Dykstra "restitution for any increase in the value of the assets resulting from his efforts." (Appellant's Brief at 26.) Talbot never explains precisely how this is to happen.

Thus, Talbot is without the only claim upon which he could equitably assert that an injunction against Dykstra should issue. As a result Talbot has completely failed to show that the District Court acted inappropriately by refusing to issue an injunction or order specific performance. More importantly, as illustrated by the preceding arguments the District Court acted entirely correctly.

CONCLUSION

Based upon the foregoing, this Court should affirm the District Court's grant of summary judgment in Mr. Dykstra's favor and hold that the District Court properly denied Talbot's motion for a mandatory injunction and specific performance.

Respectfully submitted this 2 day of June 1999.

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CERTIFICATE OF SERVICE

I certify that I mailed two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE, JACK DYKSTRA** to the following, postage prepaid this 2nd day of June 1999.

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